response for a demand for access, the LEC would be required to make available any spare facilities (such as dark fiber or any other unused media) that the LEC may have in place or could install in order to accommodate the ALEC's need to have access to that pathway.

If public property is involved, the Act grants local governments the right to manage those rights-of-way and require "fair and reasonable" compensation, but all such requirements must be "competitively neutral and nondiscriminatory." 47 U.S.C. § 253(c). The Commission should make clear that any municipality or other local government that promulgates rules or policies that have the intent or effect of denying competitors access to pathways used by LECs are not "competitively neutral and nondiscriminatory" and therefore are preempted under Section 253(d).[42]

C. The Commission Should Adopt Standards Implementing The Requirements Of Section 224(h) Concerning Owners' Modifications.

The commenters generally agree on the need for Commission standards implementing the notice and apportionment provisions of Section 224(h). This section addresses those two areas in turn.

1. Notice of Proposed Changes.

The comments on the need for and duration of notice of proposed changes underscore the need for clear Commission rules in this area. Many of the commenters argue

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[42] Several parties have already noted that a number of municipalities currently maintain discriminatory practices with respect to ALECs. See, e.g., Comcast, pp. 13-16 (May 16, 1996) (noting that, for example, cities in Michigan impose substantial fees on new entrants, while exempting the incumbent from such fees); TCI, pp. 16-17 (May 16, 1996); CFA, p. 13 (May 16, 1996); MCI, p. 22; GCI, p. 3.

that no minimum notice period is warranted;[43] some call, in the alternative, for no more than 10 days' notice, and argue that if no agreement is reached within that period, the utility has no obligation to expand an ALEC's attachment.[44] At the other extreme, some call for a notice period of six or even 12 months.[45] Many favor a middle ground: U S WEST, like AT&T and others, proposes 60 days' notice;[46] some favor 90 days;[47] Pacific notes that it typically provides 30 days' notice, and Virginia Power recommends 30 business days' notice (about 6 weeks).[48]

While there is no magic number, AT&T submits that some significant period of notice is essential and that 60 days is an appropriate minimum. A period of notice substantially shorter than sixty days is likely to leave the ALEC inadequate time to evaluate the business and technical implications of expanding its attachment, to contact the utility owner with its request sufficiently in advance of construction, and to resolve any technical or other issues so that work can proceed in a timely fashion. A period of notice substantially longer than 60 days is more than typically will be needed, and could have the potentially anticompetitive countereffect of allowing the notice period to delay new construction, and therefore potentially delay the entry of new competitors.

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43 E.g., Ameritech, p. 39; BellSouth, pp. 17-18.

44 E.g., AEPS, pp. 50-51 (¶ 79).

45 See MCI, p. 24 (180 days); Teleport, p. 10 (no less than 12 months).

46 U S WEST, p. 19; see also GST, pp. 7-8 (60 days' notice).

47 See MFS, pp. 11-12 (90 days or longer); TW Comm, p. 15 (90 days).

48 See Pacific, p. 22; Virginia Power, p. 18.

Many of the commenters seek explicit Commission recognition of a number of exceptions to the requirement for giving notice to existing attachers of possible changes. As AT&T stated in its opening comments, AT&T agrees that non-structural changes (routine maintenance or replacement of facilities) do not require a 60-day notice period. AT&T would also agree that an exception for emergency structural repair would be appropriate. But even in these situations, the utility should be required to give such notice as is reasonably possible under the circumstances. The Commission also should reject the suggestion that it create a broad exception to the notice requirement for serving new customers. It should certainly be possible in most cases for a utility to give 60 days notice of major structural changes being performed to accommodate new customer demand; where it is not possible, the maximum amount of notice reasonably available should be required.

Finally, the Commission should reject the calls for an extended grace period of one to five years before requiring utilities to contact attachers. Certainly, going forward, any party that has provided the owner with notice of its attachment at the time of attachment is entitled, under the statute, to notice of changes that the owner intends to make.

2. Apportionment Of Costs.

Most, though not all,[49] of the utilities argue for apportioning costs by simply dividing the "make-ready" costs of modification by the number of entities seeking to modify

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[49] For example, UTC and EEI argue for a complex, and, in AT&T's view, unduly discretionary and thus potentially discriminatory, approach. They claim (p. 16) that "[f]acility owners should also be able to allocate differing proportions of access costs to different attaching entities to the extent such entities have contributed in differing proportions to such costs."

their attachments.[50] At the same time, however, they argue against any provision for offsetting actual or potential revenues against these costs. Because many modifications will provide capacity for additional entities to add new attachments, the net result of the owners' position will enable them to charge new attachers for modifications that were paid for by existing attachers. To avoid this result, the Commission should clarify that an entity's "proportionate share" of the costs of making a pathway "accessible" for purposes of 47 U.S.C. § 224(h) are to be determined by the entity's percentage of newly available space reserved for that entity's use.

D. The Commission Should Reject Arguments Relating To The Takings Clause, And Duties Owed To Incumbents.

Various commenters have advanced miscellaneous legal arguments intended to restrict or distort the nature of the mandatory access obligation imposed by the Act. All should be rejected. In particular, the argument that Section 224 cannot be read to impose a mandatory duty to provide access consistent with the Takings Clause of the Fifth Amendment has no basis in law. In addition, Pacific's argument that ALECs owe a duty of access to incumbent LECs is flatly inconsistent with the plain language of the statute.

1. Concerns About "Takings" Provide No Basis For Ignoring The Statute's Mandatory Access Requirement.

Several of the commenters purport to raise an objection to the plain meaning of the statute that is ostensibly based on the Fifth Amendment to the United States Constitution.

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[50] E.g., AEPS, p. 56 n.88; Delmarva, p. 25.

The gist of the argument is that because a mandatory duty to provide access would result in a "permanent physical occupation" of the utility's pathway, takings caselaw "dictates" that Section 224(f)(1) cannot be interpreted to mandate such access.[51] In this view, such an interpretation would lead to a per se taking under Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), which then allegedly would render the statute unconstitutional. See also FCC v. Florida Power Corp., 480 U.S. 245, 253 (1987).

This argument should be rejected for two reasons. First, even assuming that the mandatory duty to provide access for pole attachments imposed by the Act were to be construed by a court as a per se taking, that would not mean that the 1996 Act is unconstitutional. As the D.C. Circuit recently stated, "the Clause prohibits only uncompensated takings; so long as the Tucker Act provides a subsequent action for redress, generally no constitutional question arises." Bell Atlantic v. FCC, 24 F.3d 1441, 1445 (D.C. Cir. 1994) (footnote omitted). Not only is a Tucker Act remedy presumed available unless Congress has explicitly foreclosed it, see id. at 1445 n.2, but the 1996 Act expressly permits utilities to be compensated for the access they must provide. Accordingly, Section 224's mandatory right of access is clearly constitutional, even if it were to be found to be a per se taking.[52]

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[51] See AEPS, pp. 7-10. It is worth noting that three utilities expressly declined to join this part of the AEPS comments. See id., p. 7 n.4; Virginia Power, p. 4.

[52] By admitting that "the revenue prospect from an additional attachment is an incentive to permit access," AEPS effectively admits that Section 224's mandatory right of access is not an uncompensated taking. AEPS, p. 41.

Second, the plain language of Section 224(f)(1) states that the utilities "shall" provide to "any telecommunications carrier" nondiscriminatory access to "any pole, duct, conduit, or right-of-way owned or controlled by it" (emphasis added). As the courts have repeatedly held, "shall" is the "language of command." See, e.g., Anderson v. Yungkau, 329 U.S. 482, 485 (1947); Southwestern Bell v. FCC, 43 F.3d 1515, 1520 (D.C. Cir. 1995). Congress has thus made the duty of access mandatory in the clearest possible terms; the Commission is not free to "interpret" the Act in order to make voluntary what Congress has made mandatory. See Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (when statute is clear, agency has no interpretive discretion).

2. The Commission Should Clarify That Competing LECs Do Not Owe A Duty Of Access To Incumbent LECs.

Finally, the Commission should reject the comments of Pacific that "CLCs should be required to provide the same access to incumbent LECs as these LECs are required to provide to the CLCs." Pacific, p. 23.

Here, as elsewhere, the LEC is proposing a rule that has no basis in, and is indeed foreclosed by, the plain language of the statute. The Act specifically exempts incumbent LECs from the definition of "telecommunication carriers" to whom the duty of nondiscriminatory access is owed. See 47 U.S.C. §§ 224(a)(5), 224(f). This exemption is, of course, fully consistent with the purpose of the Act, which is to create conditions that will allow facilities-based competition with ILECs, not to allow the ILECs to further cement their monopoly position.

III. THE COMMISSION SHOULD ADOPT ITS PROPOSED RULES REQUIRING NOTICE OF TECHNICAL CHANGES.

The Commission's proposed rules to implement Section 251(c)(5)'s requirement that ILECs provide "reasonable public notice" of technical changes in their networks would (a) define the circumstances that trigger the disclosure requirement (NPRM, ¶ 189), (b) specify the information that must be disclosed and the means of disclosure (id., ¶¶ 190-191), and (c) establish a timetable for disclosure comparable to that employed for enhanced services in Computer III (id., ¶ 192). A broad array of commenters supports those rules (or recommends that additional requirements be imposed).[53]

Some ILECs oppose some or all of the proposed rules, but their arguments are insubstantial. First, some seek to narrow the circumstances in which notice is required. Specifically, certain ILECs maintain that the disclosure requirement should be confined merely to information that is "relevant to the LEC's network at the interconnect point."[54] But such a rule would be contrary to the statute. Section 251(c)(5) of the Act requires that notice be given both of "changes in the information necessary for the transmission and routing of services using [the

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53 See, e.g., AT&T, pp. 23-25; ALTS, pp. 1-4; ACS, pp. 11-12; Cox, pp. 9-12; Frontier, p. 6; MCI, pp. 14-21; MFS, pp. 12-16; NCTA, p. 12; TRA, pp. 11-12; Teleport, pp. 11-12; TW Comm, pp. 3-11. In addition, some commenters that oppose one or more of the proposed rules nonetheless support others. See, e.g., DCPSC, pp. 5-8 (supporting all rules except proposed timetable); Bell Atlantic, pp. 10-12 (supporting proposed definitions); U S WEST, pp. 11-14 (same).

54 See GVNW, p. 1; also RTC, p. 2 ("LECs should only be required to provide information that affects network interoperability relevant at the interconnection point"); USTA, p. 12 (opposing requirement that ILECs disclose information on network design and technical standards "which do not affect interconnection").

ILEC's] facilities or networks" and of "any other changes that would affect the interoperability of those facilities or networks." The Commission properly proposes to require ILECs to disclose all information in their possession "that affects interconnectors' performance or ability to provide services" (NPRM, ¶ 189), whether relevant to the "interconnect point" or not, because such information is both necessary for proper transmission and routing and can affect the networks' interoperability.[55] Indeed, there are numerous possible technical changes that would not directly relate to the interconnect point but that could have profound implications for the connecting carriers' provision of service.[56]

Second, some ILECs oppose adopting the Computer III timetable for disclosure.[57] They propose that the timing of disclosure be governed instead by a "reasonableness" standard (Bell

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[55] This requirement is consistent with the Computer III disclosure requirement, which requires disclosure of "all information relating to network design and technical standards and information affecting changes to the teleocmmunications network which would affect [ ] intercarrier interconnection. . ." 47 C.F.R. § 65.7202(d)(2).

[56] For example: (1) Changes made by an ILEC in its switch may alter the timing of call processing, which could in turn disrupt the service an interconnected ALEC delivers to a customer that uses speed dialers or modems; (2) Network architecture changes by an ALEC such as tandem switching or trunk group rerouting -- not located at the point of interconnection -- could add delay to a call and cause echo in the end user's line, which might require the ALEC to install echo cancellers; (3) If an ALEC is interconnected to a gateway STP in order to use an ILEC's database, and the ILEC introduces an intermediate translation node between the STP and the database, then the ALEC would not be able to recognize a failure message from that node unless it had been advised that the node had been added and had reprogrammed its STP to recognize such messages; (4) If an ILEC installs digital loop carrier concentration at the loop concentrator/multiplexer, the impedence levels can change and the service of an ALEC purchasing that loop can be disrupted; (5) An ILEC may make changes to the electronics of its loop that do not affect the interface with the ALEC purchasing that loop, but that will render the ALEC's loop test procedures inoperative.

[57] Under that approach, carriers are required to disclose the information (1) at the make/buy point, and (2) at least twelve months prior to the introduction of a new service or a network change. If the carrier is capable of introducing a new service between six and twelve months of the

(footnote continued on following page)

Atlantic, pp. 11-12) or be delegated to an industry forum (USTA, p. 13). The Computer III timetable, however, was developed after full consideration by the Commission, has proved workable, and provides standards with which the industry is now familiar. There is no reason not to apply it in this context as well.[58]

Third, these disagreements themselves refute the suggestion that no national rules should be adopted because the statutory requirement "is self-effectuating and needs no interpretive regulations" (see BellSouth, p. 1) or that the Commission should merely adopt a "case by case approach" based on "experience over the next few years" (see RTC, pp. 3, 5). That would inevitably lead to the disparate application of a uniform federal statutory duty, unduly narrow interpretations of that duty by ILECs with incentives to limit disclosure, and competitive harm to new entrants.[59]

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make/buy point, disclosure at that point is sufficient provided the service is introduced no earlier than six months following disclosure.

[58] AT&T noted in its comments (pp. 24-25) one modification that should be made to that timetable: a one-year minimum notice period should be required for changes to network elements or operations support system technology so that ALECs will have sufficient time to make necessary arrangements in light of the proposed change. The Commission should thus specifically reject BellSouth's contrary proposal that it be permitted to offer a new interface immediately upon disclosure of the requisite information. BellSouth's proposal would mean that ILECs and their affiliates would have an automatic and unfair "head start" over their competitors, precisely one of the tactics Section 251(c)(5) was designed to prevent.

[59] For the same reasons, the Commission should reject the suggestion of the District of Columbia Public Service Commission (pp. 7-8) that the interpretation of Section 251(c)(5) should be delegated to the states so as to permit the application of this statutory duty to vary state by state, and that of USTA (pp. 11-12) that the Commission should delegate the issue to industry fora such as the Industry Carriers Compatibility Forum (ICCF). With respect to the former suggestion, no party has identified any actual differences in conditions among the states that would be material to

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Finally, as AT&T noted in its Comments, Section 273(c)(1) requires BOCs to meet additional disclosure requirements, including filing with the Commission "full and complete information" with respect to protocols and technical requirements for connection with, and the use of, their facilities. The suggestion that Section 273(c)(1) requires nothing more of BOCs than Section 251(c)(5) requires of all ILECs (see USTA, p. 13) is thus erroneous.

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these rules. With respect to the latter, the ICCF paper that USTA has submitted, while containing some appropriate general principles, relates to notifications by independent LECs to interconnecting BOCs about changes in access network architecture. It does not purport to address the broader disclosures required by the Act, and the Commission should not delay the adoption of necessary regulations in this rulemaking by deferring to an as-yet-uninitiated ICCF proceeding.

CONCLUSION

For all of the reason set forth above, the Commisison should aopt the rules proposed in AT&T's May 20 Comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ann Marie Abrahamson, do hereby certify that on this 3rd day of June, 1996, a copy of the foregoing "Reply Comments of AT&T" was mailed by U.S. first class mail, postage prepaid, to the parties listed on the attached Service List.

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